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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 760

ANTHONY A. LAUDATE,
PETITIONER,

v.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

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Petitioner Anthony A. Laudate, by his attorneys, prays that a writ of certiorari issue to review the judgment entered on December 3, 1962, by the Supreme Judicial Court of Massachusetts.

Opinion Below

The opinion of the court below, printed in Appendix A hereto, *infra* p. 11, is reported in 1962 Mass. Adv. Sh. 1475.

Jurisdiction

The judgment of the court below was entered on December 3, 1962, and is also printed in Appendix A hereto, *infra*, p. 16. The jurisdiction of this Court is invoked under 28 U.S.C. s. 1257(3) since petitioner had specifically set up and claimed certain rights under the constitution of the United States.

Questions Presented

I. May the entry into petitioner's store and the observation of a single memorandum of two number pool bets, which was in plain sight, by police officers, who had been checking that store almost every day during the preceding two year period for the purpose of attempting to secure evidence that petitioner was involved in a lottery, serve as a proper basis for securing a search warrant under the Due Process Clause of the Fourteenth Amendment?

II. Does the Due Process Clause of the Fourteenth Amendment sanction the seizure under a search warrant of an unmailed, unsigned letter written by petitioner to his partner, dealing with personal matters, merely because the letter also contained a detailed report of their number pool operations for the preceding week?

Constitutional Provision Involved

Section 1 of the Fourteenth Amendment to the constitution of the United States reads as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law

which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Fourth and Fifth Amendments, which are less directly involved, are printed in Appendix B, infra, p. 17.

Statement of the Case

A complaint was issued by the District Court of Springfield, Massachusetts, charging petitioner with having aided and been concerned on May 16, 1960, in setting up and promoting a lottery, in violation of Mass. G. L. (Ter. Ed.) c. 271, s. 7. Petitioner was found guilty and appealed to the Superior Court. (R. 1; Appendix A hereto, *infra*, p. 11.)

Prior to trial in the Superior Court, petitioner moved to suppress certain evidence and the fruits thereof which, he averred, had been obtained by the Springfield police as a result of an unreasonable search and seizure.

At the hearing on his motion to suppress, police officers gave the only testimony which is summarized as follows:

For two years prior to May 16, 1960, the Springfield police suspected that petitioner was concerned in promoting and setting up a lottery, but at no time during that period did they have any evidence to that effect. During that two year period they checked a shoe shine parlor and smoke shop, which petitioner operated in partnership with one Rescia, almost every day. They would observe the traffic going in and coming out and they would enter the store and look around; but they did not enter the store every day. (R. 2; Appendix A hereto, *infra*, p. 11.)

On May 16, 1960, three police officers went into the store

and looked around. Petitioner was not in the store at the time. They observed on a counter at the rear of the store a pad of paper on which were written two number pool bets. The pad and the writing on it were in plain view of anyone entering the store. As a result of observing the pad, one officer was sent to secure a search warrant. While he was gone, petitioner entered the store and was immediately placed under arrest, despite his denial of any knowledge of the pad of paper or of what was written on it. (R. 3-4; Appendix A hereto, *infra*, pp. 11-12.)

When the police officer returned with the search warrant, the three officers then made a thorough search of the store and seized the pad of paper as well as other papers observed for the first time under a small cardboard box which was on a shelf under the counter. Among them was a letter, which was later introduced in evidence at the trial. (R. 4; Appendix A hereto, *infra*, p. 12.)

At the conclusion of the evidence on the motion to suppress, petitioner argued that both searches, and the seizures under the second search, had violated his constitutional rights under the Fourth,[1] Fifth[2] and Fourteenth Amendments to the federal constitution. Despite such contentions, the trial judge denied petitioner's motion to suppress, and petitioner seasonably saved an exception. (R. 4; Appendix A hereto, *infra*, p. 12.)

Later, at the jury trial, the police officers testified how they had first entered petitioner's store, looked around and observed a pad of paper lying on the counter; how one of them then went and obtained a search warrant; how, upon his return with the search warrant, all three police officers then made a thorough search of the store, during the course of which they seized various papers, including the pad of paper which was lying on top of the counter

[1] Appendix B hereto, *infra*, p. 17.
[2] Appendix B hereto, *infra*, p. 17.

and a letter which was under a box on a shelf in back of the counter. (R. 4-5; Appendix A hereto, *infra* p. 12.)

The Government offered in evidence the pad of paper with the two number pool bets on it. Petitioner objected first, because the police could not testify as to what they observed in petitioner's store before the issuance of the search warrant, since their almost daily intrusions constituted an illegal search; and second, because what they observed and seized after the issuance of the search warrant, being the fruits of the first illegal search, was also inadmissible. Nevertheless, the trial judge admitted the pad of paper in evidence and permitted the police officers to testify, over petitioner's objection, as to the meaning of the writings on the pad of paper. Petitioner seasonably saved his exceptions to both rulings. (R. 5; Appendix A hereto, *infra*, p. 12.)

The Government then offered in evidence the letter which had been discovered and seized after the issuance of the search warrant. The letter purported to be an unmailed, unsigned letter written by petitioner to his partner who was then in jail. In the letter petitioner not only inquired of his partner's health, made some small talk about his last visit and someone named Charlie who was helping him spread loam in his backyard, and complained that he could not complete the letter because he had a splitting headache, but he also gave his partner a report as to the number pool figures for the preceding week and complained that that week was the first one in which business had dropped under $1,000. Petitioner objected to the admissibility of the letter: first, because the search warrant and the search and seizure made under it were the products of the first unreasonable search and were, therefore, themselves inadmissible; and second, because the police could not seize, even under a valid warrant, a private paper of evidential value only. Despite petitioner's objection, the

trial judge admitted the letter in evidence, subject to petitioner's exception. (R. 5; Appendix A hereto, *infra*, pp. 12, 13, 15-16.)

The trial judge then allowed the police officers to testify, over petitioner's objection and subject to his exception, that after they had arrested petitioner, they questioned him about the letter and he admitted not only that he had written the letter to his partner, but also that it contained a report of their number pool operations for the preceding week. Petitioner had objected because the questioning by the police officers had been stimulated by the illegally acquired letter. (R. 5; Appendix A hereto, *infra*, p. 12.)

After both sides had rested and completed arguments, the trial judge instructed the jury that the letter had been obtained during the course of a valid search and seizure and was, therefore, evidence which the jury could consider on the question of whether petitioner had been concerned in promoting and setting up a lottery, as charged. Petitioner also excepted to those instructions. (R. 5-6.)

The jury returned a verdict of guilty and petitioner was sentenced to be imprisoned for a term of six months and to pay a fine of $1,000. (R. 7.) The trial judge refused to stay the execution of the sentence. However, on petition, a single justice of the Supreme Judicial Court issued a certificate of reasonable doubt, ordered that the execution of the sentence be stayed pending the hearing of petitioner's bill of exceptions and the decision thereon, and admitted petitioner to bail. Petitioner continues to be enlarged on bail.

Petitioner seasonably prosecuted his exceptions to the Supreme Judicial Court, briefing and arguing the very two questions presented here.

That Court overruled petitioner's exceptions. (Appendix A hereto, *infra*, pp. 11-15.)

In passing upon the first question, the Supreme Judicial

Court, ignoring the almost daily intrusions by the police during the preceding two year period, held that their entry into a store, which "was open to the general public," and their observation in that store of the memorandum of the two number pool bets, "which was in plain sight," constituted a "proper basis for the obtaining of a search warrant." (Appendix A hereto, *infra*, p. 13.)

In dealing with the second question presented here, the Supreme Judicial Court accepted only for the purpose of argument the principle that a private paper of evidential value could not "be lawfully seized even under a valid warrant." It determined that the letter, instead of being "of value only as evidence," "was a report by one partner to another," which "was essential in the continuation of the business as a going concern;" and it reasoned that should the form of the document be decisive, "necessary business records, if kept wholly in the form of correspondence, might be made immune from seizure." The court below acknowledged that "no case involving an issue precisely like that presented by the letter has come to our attention;" and it emphasized that "in the present state of the decisions of the Supreme Court of the United States, which in this area we must follow if applicable, we do not venture to predict what course would be considered reasonable on the present facts." The court below concluded finally that "no controlling Federal authority requires us to overturn the rulings" of the trial court. (Appendix A hereto, *infra*, pp. 13-15.)

Reasons for Granting the Writ

I.

A. It is undoubtedly true that police officers, like anyone else, may lawfully enter a store which is open to the public, observe anything that is in plain view, and then use their

observations to secure a search or arrest warrant, *Nicholson* v. *United States*, C.C.A. 7, 6 F.2d 569; *United States* v. *Bloom*, C.C.A. 1, 6 F.2d 584. But that is not to say that they may properly convert the license extended to customers and other business invitees into a license to harass.

B. Here, the almost daily intrusions by the police, even into a store to which the public was invited, smack too much, in our opinion, of a police state. Such conduct has never received the sanction of this Court, cf. *Kremen* v. *United States*, 353 U.S. 346, 77 S. Ct. 828; and should now be resolutely proscribed. If, as contended, that practice should be condemned, it would necessarily follow that the officers' observation of the incriminating pad of paper, even though in "plain sight," the search warrant, and the evidence procured in the course of the search thereunder, would all be inadmissible because themselves "the illegal product of a previously unlawful search by the . . . authorities." *McGinnis* v. *United States*, C.A. 1, 227 F.2d 598, 602.

C. It seems to us that police practices of the kind involved in this case can only lead "down the road to totalitarianism,"[3] unless quickly and unequivocally condemned. This Court should summarily denounce conduct which can only result in the steady erosion of the constitutional rights of the people.

II.

A. While the court below readily accepted the principle, mentioned in *Abel* v. *United States*, 362 U.S. 217, 238, 80 S. Ct. 683, 696, that "documents used as a means to commit crimes are the proper subjects of search warrants, *Gouled* v. *United States*, 255 U.S. 298, 41 S. Ct. 261, and are seiz-

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[3] Frankfurter, J., dissenting in *Irvine* v. *People*, 347 U.S. 128, 149, 74 S.Ct. 381, 392, quoting from Statement by Director J. Edgar Hoover of the Federal Bureau of Investigation in FBI Law Enforcement Bulletin, September, 1952, p. 1.

able when discovered in the course of a lawful search, *Marron v. United States*, 275 U.S. 192, 48 S. Ct. 74," it was less willing to accept the principle, emphasized once more in *United States v. Lefkowitz*, 285 U.S. 452, 468, 52 S. Ct. 420, 423, that private papers "of evidential value only," may not "lawfully be searched for and taken even under a search warrant issued upon ample evidence and precisely describing such things and disclosing exactly where they were".

B. Here, the letter, much of which was devoted to small talk, was no more the means of committing the crime of being concerned in the promoting and setting up of a lottery than were the letters which, in *Weeks v. United States*, 232 U.S. 383, 397, 34 S. Ct. 341, 344, were held to have been taken "in direct violation of the constitutional rights of the defendant;" or the unexecuted form of contract and the bill for legal services which, in *Gouled v. United States*, 255 U.S. 298, 310-311, 41 S. Ct. 261, 265, were held to have been taken in violation of the Fourth and Fifth Amendments, even though seized under a validly issued search warrant; or the papers which, in *United States v. Lefkowitz*, 285 U.S. 452, 464, 465, 52 S. Ct. 420, 423, were held to have been exempt from seizure "even under a search warrant issued upon ample evidence and precisely describing such things and disclosing exactly where they were;" or "the application for a license" and the "consignment" which, in *Takahashi v. United States*, C.A. 9, 143 F.2d 118, 123-125, were directed to be suppressed; or the private papers which in *Brook v. United States*, C.A. 5, 223 F.2d 681, 686, were held to be inadmissible under the Fifth Amendment. Moreover, no federal court has ever sanctioned the search for and seizure of anything so personal and private as a letter. Cases such as *Marron v. United States*, 275 U.S. 192, 48 S. Ct. 74; *Harris v. United States*, 331 U.S. 145, 67 S. Ct. 1098; *Abel v. United States*, 362 U.S.

217, 80 S. Ct. 683; and *United States* v. *Clancy*, C.A. 7, 276 F.2d 617; are clearly inapposite. In each of those cases, the articles seized either were used to commit or carry on a crime or, as in the *Harris* case, were property, the mere possession of which was a crime.

C. The decision of the court below is in conflict with the decisions of this Court. Its opinion exhibits, in our view, a misunderstanding of the teachings of this Court. Moreover, in expressing the reason for the failure of the court below to "venture to predict what course would be considered reasonable (by this Court) on the present facts," the opinion unduly emphasized what the court below considered to be the conflicting "state of the decisions" of this Court. In either case, the reason for its decision is not too important. What is essential, however, is that this Court make clear that the rights of privacy and secrecy must be given a liberal construction by all courts if "the most comprehensive of rights and the right most valued by civilized men"[4] are to be preserved.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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attorneys for petitioner.

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[4] Brandeis, J., dissenting in *Olmstead* v. *United States*, 277 U.S. 438, 478, 48 S.Ct. 564, 572.

Appendix A

OPINION AND JUDGMENT OF THE COURT BELOW

OPINION BELOW

COMMONWEALTH v. ANTHONY A. LAUDATE

Wilkins, C.J. A complaint was issued by the District Court of Springfield charging the defendant with having aided and been concerned on May 16, 1960, in setting up and promoting a lottery in violation of G. L. (Ter. Ed.) c. 271, § 7. The defendant was found guilty and appealed.

Prior to trial in the Superior Court the defendant moved "to suppress any and all the evidence and the fruits of any and all evidence seized by the police department as a result of an unreasonable search and seizure." At the hearing on the motion to suppress, police officers of Springfield gave the only testimony, which we summarize.

On May 16, 1960, three police officers, without a search warrant, entered the premises at 2000 Main Street, Springfield, in which the defendant operated a shoe shine parlor and smoke shop in partnership with one Rescia. The premises, consisting of a store and a small back room, were between six and seven feet wide and thirty-five feet in depth. Beginning in November, 1958, the police suspected that the defendant was concerned in promoting and setting up a lottery, but never observed him writing number pool or lottery bets. During that time they usually checked every day, observing traffic, but not always going upon the premises.

Upon entering the store on May 16, 1960, the officers saw one Parsons. They stayed in the front part of the premises and did not enter the back room. On a counter at the rear of the store about twenty feet from the front door they

observed a pad of paper, two and one-quarters inches by four inches, on which were written two number pool bets. The pad and the writing on it were in plain view of one entering. As a result of observing the pad, one officer was sent to secure a search warrant. In his absence the defendant entered and was placed under arrest despite his denial of knowledge of the pad or the writing on it.

Upon return of the officer with the search warrant, the three officers made a thorough search, seized the pad of paper, as well as other papers observed for the first time under a small cardboard box, which was on a shelf under the counter. Among them was a letter, which became exhibit 2 at the trial.

The motion to suppress was denied subject to the defendant's exception.

At the jury trial, the police officers testified as to entering the store, observing the pad of paper, obtaining the search warrant,[1] the defendant's arrest, and the search and seizure of the other papers. The prosecution offered the pad of paper, which was admitted in evidence as exhibit 1, and the officers were permitted to testify as to the meaning of the writing on the pad. Exhibit 2 was an unmailed, unsigned letter written by the defendant to his partner, who was then in jail. It contained a detailed report of their number pool operations for the week preceding May 16. There was testimony by the officers that after the defendant's arrest they questioned him about the letter and he admitted that he had written it to his partner and that it contained a report of their number pool operations for the preceding week. The defendant excepted to the admission in evidence of the two exhibits and to the testimony of the officers concerning them.

The entry of the officers into the shoe shine parlor and

[1] The search warrant is not in the record, which does not disclose that it was offered in evidence below.

smoke shop was lawful. This portion of the premises was open to the general public. While there they observed the pad with the written number pool bets which was in plain sight. There was a proper basis for the obtaining of a search warrant. This part of the case falls within numerous Federal decisions. We need cite but a few. *United States* v. *Bloom*, 6 F.2d 584 (D. Mass.); *Smith* v. *United States*, 105 F.2d 778 (C.A. App. D.C.); *Fisher* v. *United States*, 205 F.2d 702 (C.A. App. D.C.), cert. den. 346 U.S. 852. The pad was lawfully seized under the search warrant.

As to the letter, the defendant contends that it is nothing more than a private paper of evidential value and could not be lawfully seized even under a valid warrant. See *Boyd* v. *United States*, 116 U.S. 616; *Gouled* v. *United States*, 255 U.S. 298, 310-311. Accepting this principle for the purposes of this argument, this was no mere letter of value only as evidence. This was a report by one partner to another covering the most recent week's operations of their joint enterprise. The report gave detailed figures for the six business days of that week.[2]

Such a report was essential in the continuation of the business as a going concern. That it was not in the form of a standard book of account is not decisive. Otherwise,

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[2] The letter contained the following schedule:

			TAKE	OFFICE	PAY OUT
Lady Liz 50c t	360	Mon.	295.58	65.00	225.00
	450	Tues.	133.81	46.00	0.
	817	Wed.	113.41	38.40	0.
	631	Thurs.	135.61	44.00	0.
Chuckh 15c					
Mrs. Walker 5c	805	Fri.	112.25	52.00	90.00
	191	Sat.	161.58	66.00	0.
		Total	$982.24	$309.40	$315.00

T. 982.24 O. 309.40 P.O. 315.00 PAY 128.00 BANK 0

necessary business records, if kept wholly in the form of correspondence, might be made immune from seizure. Compare *Commonwealth* v. *Dana*, 2 Met. 329, 337.

This was not an unreasonable search. The pad of paper with its recorded bets was an indication not only that an illegal lottery was being conducted but also that it was being conducted on those very premises which were the place of business of the defendant and under his control. A thorough search of those premises was not unreasonable. That search brought to light a not unforeseeable thing, namely, this report in summary of the preceding week's business.

No case involving an issue precisely like that presented by the letter has come to our attention. We have treated this case as one of a reasonable search and seizure in a place of business under a valid search warrant. We have not rested our decision upon the right of search incident to a lawful arrest, although doubtless such an argument might be advanced.

"There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances." *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, 357. See *United States* v. *Kirschenblatt*, 16 F.2d 202 (2d Cir.). In the present state of the decisions of the Supreme Court of the United States, which in this area we must follow if applicable, we do not venture to predict what course would be considered reasonable on the present facts. In *Trupiano* v. *United States*, 334 U.S. 699 (a five to four decision), Chief Justice Vinson, dissenting, said (page 716), "At best, the operation of the rule which the Court today pronounciates for the first time may be expected to confound confusion in a field already replete with complexities." In *United States* v. *Rabinowitz*, 339 U.S. 56 (a five to three decision), the *Trupiano* case was overruled to the extent that it "requires a search warrant solely upon

the basis of the practicability of procuring it rather than upon the reasonableness of the search after a lawful arrest" (page 66). In one of the dissenting opinions, Mr. Justice Black said (page 67), "But overruling that decision merely aggravates existing uncertainty. For as Mr. Justice Frankfurter points out, today's holding casts doubt on other cases recently decided. And I do not understand how trial judges can be expected to foresee what further shifts may occur."

In one of the most recent cases, a five to four decision, *Abel* v. *United States*, 362 U.S. 217, the majority opinion by Mr. Justice Frankfurter concedes (page 235) that the decisions of that court "cannot be satisfactorily reconciled." At page 238 he says, "Documents used as a means to commit crime are the proper subjects of search warrants, *Gouled* v. *United States*, 255 U.S. 298, and are seizable when discovered in the course of a lawful search, *Marron* v. *United States*, 275 U.S. 192."

We think that the letter was admissible. No controlling Federal authority requires us to overturn the rulings in the court below.

Exceptions overruled.

"Sunday Night
10.15

"Hi Partner

"I hope this letter finds you in the best of health. It was real nice to see you Saturday. You are looking good. Did you see me Saturday Night. I saw the light and I think I saw you wave your hand.

"Did you see Charlie he is doing good he is helping me spread loam in the back yard. I am trying to get it in shape. He clean the floor Thursday and it looks nice.

"Some guy came in Saturday and wanted to sell me 1,500 pockets books pack in boxes. I told him I give him 2c apiece for them and that we could used them. He said he will have to talk to his wife I don't think he'll come back. Carlo here is the figures for last week [Here appears the scheduled printed in the footnote, *supra*.]

"Well we started off last week bad but a last least we made a little pay. Business is dropping as you can see this was the first week we drop under 1,000 for take. Carlo I hate to stop writing now but

JUDGMENT BELOW

COMMONWEALTH OF MASSACHUSETTS.

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH,
AT BOSTON,

December 3, 1962.

IN THE CASE OF

COMMONWEALTH

ANTHONY A. LAUDATE

pending in the Superior Court for the County of Hampden

ORDERED, that the following entry be made in the docket: viz.,—

Exceptions overruled.

BY THE COURT,

RICHARD A. McLAUGHLIN, *Clerk*.

December 3, 1962.

Brief statement of the grounds and reasons of the decision: See opinion on file.

A true copy.
Attest:
(s.) RICHARD A. McLAUGHLIN, *Clerk*.

I got a splitting headache. I will finish the letter in the morning. Good night Partner.

"Monday morning Hi Carlo well I am down the store now and it is dead outside you can here [*sic*] a pin drop.

"Well a guy's coming in for a shine he got a pair of filthy shoes on, he's filthy himself.

"Carlo do you get many letters from guys."

Appendix B

Other Constitutional Provisions

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."